Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

THEODORE R. GIUTTARI,

Petitioner

v.

AMERICAN HOME PRODUCTS CORP.

Respondent

On Petition For AWrit Of Certiorari
TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision by the New Jersey Supreme Court denying certification in this case has resulted in depriving Petitioner of his rights to a fair trial, due process and equal protection of the laws that are guaranteed under the United States Constitution?

2. Whether the decision by the New Jersey Supreme Court denying certification in this case has resulted in depriving Petitioner of his civil rights (a) to be protected from unlawful discrimination in the workplace and (b) to prove his age discrimination claim against Respondent within the legal framework set by federal and state anti-discrimination statutes and pursuant to the evidentiary rules prescribed by the decisions of the United States Supreme Court for age discrimination cases?

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Petitioner, Theodore R. Giuttari, respectfully requests this Court to issue a writ of certiorari to review the final judgment of the New Jersey Supreme Court in this case.

OPINIONS BELOW

The New Jersey Supreme Court denied without opinion Petitioner's petition for certification to review the New Jersey Superior Court Appellate Division's decision in this case. The New Jersey Supreme Court's final order and decision, entered June 17, 2004, is unreported and is reproduced in Appendix A. The decision of the New Jersey Appellate Division denying Petitioner's appeal from a no cause jury verdict against him was entered on April 7, 2004. It is unreported and reproduced in Appendix B.

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW

Petitioner filed a two-count age discrimination complaint pursuant to New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 – 10:5-49, with the Morris County Superior Court Law Division of New Jersey on June 24, 1998. In the suit he alleged that he was constructively discharged from his position with Respondent following 23 years of continuous services at the age of 65, after suffering a pattern and practice of age-

related harassment, discrimination and a hostile work environment that was inflicted upon him.

Respondent filed its answer on August 18, 1998, denying Petitioner's allegations of discrimination and damages and asserting various separate defenses, including statute of limitations.

After extensive motion and discovery proceedings, the matter was tried before the Morris County Superior Court Law Division between June 4 and June 28, 2001. Sixteen witnesses were called and more than three hundred exhibits were introduced in evidence. At the close of Petitioner's case the trial court denied Respondent's motion for dismissal and ruled that Petitioner had made a prima facie age discrimination case. On June 28, 2001 after brief deliberation of less than an hour, the jury returned a verdict for the Respondent. Subsequently, Petitioner's motion for new trial was denied and final judgment was entered in the Respondent's favor on August 17, 2001 (Appendix C and D).

Petitioner appealed the verdict and judgment with the New Jersey Superior Court Appellate Division on October 3, 2001 for having been denied a fair trial due to numerous reversible errors committed by the trial court in its rulings. These precluded him *inter alia* from proving his age discrimination case by (1) permitting excessive and extremely prejudicial hearsay testimonies from Respondent's witnesses to justify its discriminatory action; (2) denying Petitioner the opportunity to call witnesses and

present evidence to rebut and prove Respondent's pattern and practice of age discrimination, and (3) refusing to allow Petitioner the opportunity to offer a rebuttal case at the end of Respondent's case.

Upon denial of his appeal on April 7, 2004, Petitioner filed a petition for certification with the New Jersey Supreme Court on May 7, 2004 for review of the denial. He claimed anew that as a result of the Appellate Division's and trial court's decisions below, he was denied a fair trial in violation of his federal constitutional rights and his civil rights to prove his age discrimination claim and exercise the opportunity to rebut Respondent's proffered non-discriminatory reasons pursuant to applicable anti-discriminatory statutes and evidentiary rules established by the United States Supreme Court. The New Jersey Supreme Court denied the petition without opinion by order filed on June 17, 2004.

JURISDICTION

The New Jersey Supreme Court, as the highest court of last resort in the State of New Jersey, rendered a final decision in this case that was filed on June 17, 2004, ordering that Petitioner's petition for certification be denied. Consequently, this Petition for a Writ of Certiorari has been timely filed with this Honorable Court pursuant to Rule 13 of the Rules of the United States Supreme Court within ninety (90) days after the final judgment of the highest court of the State of New Jersey was entered.

The jurisdiction of this Honorable Court to issue a writ of certiorari herein is invoked pursuant to 28 U.S.C. 1257 (a) (Appendix E), in accord further with 28 U.S.C. 2104 (Appendix F) and 28 U.S.C. 1651 (a) (Appendix G).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the foregoing statutes, the following Amendments of the United States Constitution are involved, which provide in pertinent parts:

Amendment V: "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

Amendment XIV: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment VII: "In Suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

STATEMENT OF THE CASE

Petitioner was hired as Defendant's international counsel in 1973 when he was 42 years old. After turning 60 in 1991, he began to experience various discriminatory actions that culminated and intensified in his final year,

when he reached 65 and was forced to resign because of such actions after 23 years of competent services.[1]

The discriminatory actions complained of entailed various decisions by his superiors in his final years, involving *inter alia* a drastic curtailment of his regular legal assignments and their transfer to younger, junior attorneys, denial of promotions, relegating Petitioner in his final years to administrative and clerical tasks, reduced salary and bonus increments, removal from his office to a distant office half the size that was hastily converted from a small meeting room, assigning his former office to a recently hired younger attorney and depriving him of regular secretarial assistance. The above were for the most part enacted in his final year. The factual occurrences of the actions are not in dispute. The parties differ however as to their motivation.[2]

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[1] In his final years, for example, Petitioner was commended for having directed and achieving a successful defense in defeating a four-year lawsuit brought against Respondent in Saudi courts by a Saudi firm seeking to recover $50 million as damages for unlawful termination of its service contract by the Respondent.

[2] A full description of the hostile employment actions undertaken against Petitioner appears in his New Jersey Appellate Division Brief at 5 to 8. For example, the testimony of the only independent witness at trial, a former co-worker no longer employed by Respondent, Zwiech, corroborated of her personal knowledge that in Petitioner's final year he was treated "like an outcast' and "all he was doing" was essentially administrative/clerical work, while the other attorneys were busy "doing different things and traveling" (Trial Trans. v. 7: 12 to 18).

In the course of trial and appeal evidence was submited that during Petitioner's employment, Respondent openly had and pursued a written policy against retaining older employers. This was incorporated in its corporate manual prescribing personnel policies and decision-making procedures. The policy stated unambiguously that employees over 65 years of age were required to obtain prior management approval to continue working beyond 65.

In order to prove the existence of the anti-age policy and Respondent's animus against older employees as part of his case, and also counter Respondent's reasons offered to rebut Petitioner's prima facie discrimination claim, Petitioner attempted to introduce witnesses at trial who knew first hand about Respondent's age discrimination practices and anti-age mindset that were still prevalent in the 1990s.

The trial court however deemed such evidence too inflammatory and issued rulings precluding him from calling such witnesses and also denied his request for the opportunity to present a rebuttal case at the close of Respondent's case. By its decisions the New Jersey Supreme Court and Appellate Division refused to overturn or review the rulings and thereby permitted them to stand.

1. <u>Preclusion of Petitioner's Witnesses</u>

The trial court's reasoning was based on the fact that one of the witnesses whom Petitioner wished to call, but was not allowed to, was a fellow attorney, Jablonski, a contemporary of Petitioner also employed by Respondent. The

attorney had in 1997 recovered a substantial money judg - ment against Respondent in New Jersey courts for being summarily terminated after he reached 65 because of his age. The court in Petitioner's case felt Jablonski's testimony would inflame the jury and should not be allowed. He had personal knowledge of Respondent's anti-age personnel policy, not only as it was applied to him, but also because he had a leading role in applying it and other tactics used by Respondent over the years to get rid of older employees. It was Jablonski's job and responsibility to arrange for sundry dismissals of older employees and manage EEOC complaints filed against the Respondent.

In subsequent appeals the New Jersey Supreme Court and Appellate Division both upheld Jablonski's verdict, and in an unpublished opinion rendered in 2001, acknowledged the manual's anti-age policy as a factor in affirming the verdict. A copy of the opinion with the manual's pertinent provisions is contained in Petitioner's Appendix filed with the New Jersey Supreme Court and Appellate Division in this case. (N.J. Sup. Ct. Appendix: 2-36).

As a result of such rulings Petitioner was prevented from proving his age discrimination case and by the same token, was denied the opportunity to discharge his burden of rebutting Respondent's proffered non-discriminatory reasons, to which he was entitled pursuant to the standards prescribed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (hereinafter "*McDonnell Douglas*").

2. Preclusion of Petitioner's Rebuttal Case

In its case Respondent's employees testified at length that Petitioner was not forced to leave due to age, but that he had self-serving, ulterior motives for leaving, that is, he was eager to assume a new position in Saudi Arabia! Petitioner was cast to the jury as so enamored and fascinated with Saudi life, culture and the opportunity to live in Saudi Arabia, that he would gladly leave his wife, children and elderly parents behind to take advantage of the opportunity. Shortly after leaving, Petitioner did find employment as Legal Advisor to a Saudi government-owned production firm in Riyadh that he endured for five years.

As the ability to prove constructive discharge was essential to Petitioner's case, it was imperative for him to respond to Respondent's novel allegations by offering a rebuttal case at the close of Respondent's case and thereby show the hardships, difficulties and risks that the Saudi move entailed for him and his family. He was thus denied the opportunity to show also that, given his advanced age and finances, he was forced to accept the Saudi position as the only employment he could find. However, the trial court precluded him from doing so, unfairly, and the New Jersey Supreme Court in refusing certification, has in turn concurred and permitted the erroneous rulings to stand.

3. Respondent's Hearsay Evidence

Respondent's main defense, as also its proffered non-discriminatory reason, was basically that it had found

Petitioner guilty of sexual harassment against his secretary in his final year when the discriminatory acts complained of intensified to the extent of forcing him to resign.[3] It was for such reason that Respondent claimed it inflicted a number of penalizing actions it admitted taking against him, largely in retribution or to remedy the harassment charge by separating Petitioner and his secretary. However, Respondent's measures extended well beyond mere separation, and incorporated the other demeaning measures outlined above. At trial it failed to offer or suggest any compelling reason of business necessity for them.

Petitioner asserted the defense was bogus and only a subterfuge to disguise its true age-motivated purpose for the actions, i.e., to force him to retire because he was too old, rather than fire him outright and risk an age discrimination suit. In fact, when Respondent's officers were first told about Petitioner's forced departure in 1996, their reaction was that: "he was 65 years of age, and it was time to let him go on his way" (Trial Transcript,. vol. 5, p. 68).

Respondent had also in 1996 incurred such a risk when it fired another fellow attorney, Schneider, in his mid 60s likewise, for alleged incompetence. Subsequently, Respondent reached a settlement with Schneider on condition that he relinquish all age discrimination claims. However, when

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[3] For the "high level of stigma" and smearing effect that a charge of sexual harassment is capable of carrying today, see *Krakunas & Pallet v. Iona College*, 119 F. 3d 80, 86-88 (2d Cir. 1997) *and K.S. v. ABC Prof'l Corp.*, 330 N.J. Super. 288, 292 (App. Div. 2000) where the court practically associated "rape" with sexual harassment.

Respondent learned that Schneider was to testify for Petitioner at trial, which he did, it endeavored to pressure him from testifying by threatening to rescind the settlement and require him to return all the monies that had been paid to him in the 1996 settlement (N.J App. Div. Brief: 8).[4]

In the course of trial, the issue of harassment inevitably arose which Petitioner consistently denied in his direct and cross examinations, as he had vehemently denied it when initially made in 1995. In addition to serious deficiencies, improprieties and unfairness characterizing Respondent's investigation of the charge that were elicited from its witnesses at trial, Petitioner submitted in evidence a letter that his secretary wrote to him in 1998 as part of a settlement for dismissing a libel action commenced against her. The letter was prepared by Respondent's counsel herein who also represented her in the libel suit. In plain terms she stated that it was not her "intent to complain or accuse" Petitioner of "sexual harassment," but only to seek "re-assignment" or a change in position (Appendix H).

Because of a tense relationship with Petitioner over her job performance, when the secretary decided to approach Respondent's human resources in 1995 for a change in position, she produced several notes and post cards that Petitioner had sent her. Other than such writings, there was

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[4] In fact Petitioner testified how particularly conscious he was of Respondent's anti-age policy in his final years from having seen the termination for age-perceived reasons of a number of older attorneys and other employees with whom he worked and whom he also wanted to call as witnesses on his behalf, but except for Schneider, could not.

never any evidence or testimony introduced to show that she ever filed a claim of sexual harassment, ever used the term "sexual harassment" or even "sexual" in her discussions with Respondent. Her 1998 letter to Petitioner, as also Respondent's records of its investigations, fully support this conclusion. As the evidence adduced at trial also show, unbeknown to Respondent in its investigations, Petitioner had on a number of occasions represented the secretary as her attorney, given her recommendations and was invited with his family to her parents' home in Puerto Rico.[5]

The secretary's signed letter however was of crucial importance not only because she denied intending to charge sexual harassment, but also because she failed to appear at trial to testify in support of Respondent's contention that the sexual harassment incident was the prime motive for the discriminatory actions taken against Petitioner. Her absence was unexplained, notwithstanding that Respondent's counsel specifically advised and represented to the court and Petitioner's counsel prior to and during trial that she would definitely appear to testify (Petitioner's App. Div. Brief, 18-19, 22).

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[5] Even in the two-year libel suit in which appeals were made to the New Jersey Supreme Court, she never mentioned or alluded to sexual harassment, directly or indirectly, in any of the several affidavits that she personally signed in the action (Hudson County Superior Court Law Division Docket No. 3700-96). Respondent's counsel has also never to date addressed the meaning of the letter in this case.

Despite her absence however, the trial court permitted Respondent to reconstruct the minute details of the alleged charge for the jury's benefit through the overwhelming single, double and triple hearsay testimonies of six employees over as many days of trial, without offering or invoking any particular recognized exception to the hearsay rule under New Jersey Rules of Evidence.

The six witnesses testified in effect as to what the secretary purportedly said or did when she requested a change in position from Respondent's personnel manager, who in turn told a few of the witnesses, and they in turn told other witnesses as to what they heard about the secretary's doings. The trial court permitted such evidence notwithstanding Petitioner's objections to their hearsay and inflammatory character, and that evidently they were designed to prejudice the jury against the Petitioner and to distract them from the main age discrimination issue in the case. All the witnesses admitted moreover that they had no personal knowledge of the alleged harassment events; four never even met the secretary, and none had participated in the company's investigation, except for its human resource manager. (N. J. App. Div. Brief, 19-23).

Of equal if not greater significance was the trial court's complete failure to give any curative or cautionary instructions to the jury about their use of the hearsay evidence. The jury was never instructed that such hearsay testimonies should not be considered for the truth of their contents, although requested by Petitioner's counsel to do

so, and even though, absent such request, cautionary instructions should have been given at any rate.

4. Respondent's Case for Admitting Hearsay

Respondent has advanced two arguments for admitting the hearsay. Firstly, the hearsay testimonies were admis - sible because they were **not** offered for the truth of their contents, i.e., Petitioner's guilt. This position is however untenable. If the hearsay testimonies were not offered for the truth of the charge they contain, then the rationale underlying the "legitimate reasons" articulated to rebut Petitioner's discrimination claim, lacks the "clarity" and veracity required of it by *McDonnell Douglas*. Logically, unless the charge contained in the hearsay testimonies was true, or asserted to be true, the so-called 'legitimacy' of the reasons offered by Respondent appear to lose legitimacy as well as veracity. Respondent's position then becomes the equivalent of never having offered any rebuttal.

By the same token, Respondent's witnesses necessarily had to assert that the sexual charge contained in their hearsay testimonies was true. Otherwise, they would also be in the position of having to concede that the severe remedies enacted by Respondent to penalize Petitioner because of the charge, were unjustified, unless, again, the charges that they testified about were true.

Secondly, Respondent argued that since Petitioner did not contest the notes and post cards, he automatically admitted misconduct and harassment. He thereby 'opened

the door' and rendered debate about hearsay totally irrelevant, with no need moreover to justify admission under any of the recognized evidentiary exceptions to the hearsay rule.

This approach is equally fallacious. Petitioner never admitted and in fact denied the charge throughout trial. The only visible indication at all in evidence of what the secretary personally had in mind when she went to human resources for a change in position, was her 1998 letter to Petitioner that she had no intention of making such a charge. It was incumbent upon Respondent, therefore, to disprove Petitioner's position and disprove it with the best, credible, admissible evidence possible.[6]

For unexplained reasons, however, Respondent refused to call the one witness who was available with the personal knowledge to testify and resolve the issue.[7] Thus, her request for a change in position, created a double windfall

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[6] Interestingly, the facts in *McDonnell Douglas* bear a close similarity to Petitioner's facts. The *McDonnell Douglas* employer also tried to justify its unlawful discrimination and defeat the suit "based solely" on the employee's "unlawful" conduct. However, unlike Petitioner, the *McDonnell Douglas* employee clearly admitted his guilt, was arrested, "pleaded guilty" and was fined for his misconduct. Id. at 795-97.

[7] Petitioner not only never admitted guilt, but the alleged victim's letter to him also corroborated his position. Significantly, five female co-workers who knew and worked with Petitioner for years denied in their trial testimony of their personal knowledge that Petitioner ever behaved in an "inappropriate" or "unprofessional" manner or in any way that could be seen as "sexually offensive." (N.J. Sup. Ct. Brief, 6)

for it: (1) as the pretext to force him out and (2) at trial to smear him to the jury as a sexual predator, without support from any witnesses having personal knowledge.

In sum, because of the decisions rendered by the New Jersey courts, allowing an inordinate volume of prejudicial hearsay testimonies to overwhelm the trial, and thereby distract and confuse the jury, Petitioner was severely prejudiced. Coupled with other orders precluding him from calling witnesses and presenting a rebuttal case to prove his age discrimination claim, he was in fact and at law denied the fair and impartial trial and opportunity to be heard, to which he was entitled.

REASONS FOR GRANTING THE WRIT

The federal issues raised in this Petition are twofold. One involves Petitioner's constitutional claim of having been denied his right to a fair and impartial trial, in violation of due process and equal protection of the laws guaranteed to him under the United States Constitution, by virtue of the collective impact of the New Jersey court decisions rendered in this case.

The second concerns a claim of federal magnitude arising also from the combined impact of the New Jersey decisions that violated his civil rights, particularly, the substantive and procedural safeguards prescribed by the United States Supreme Court to govern the processes and procedures of judicial remedies enacted by federal and state laws to protect employees against unlawful discrimination

in the workplace and to enable them to sue to redress grievances.

More specifically, the New Jersey court decisions in short are in direct conflict with the clear directives of the United States Supreme Court set forth in *McDonnell- Douglas,* which have been affirmed repeatedly and clarified uniformly by decades of judicial precedents, including of note, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993) (hereinafter "*Burdine*" and "*Hicks.*").

For a proper analysis of this federal question, two aspects require resolution: (1) whether the New Jersey courts improperly lowered the bar substantially for employers sued under federal or state anti-discrimination laws by permitting them to discharge their requisite *McDonnell Douglas* burden of production through hearsay or any type of inadmissible evidence, and (2) whether the precedent set by the decisions of the New Jersey courts in this case have incapacitated employees from proving their discrimination claim and exercising the "opportunity" to discharge the third phase of their *McDonnell Douglas* burden.

1. <u>The Constitutional Issue</u>

The constitutional concern with ensuring private citizens a "meaningful opportunity to be heard" and a fair and impartial trial of their grievances, is not open to dispute. Justice Harlan called the denial of a fair trial the equivalent of a "denial of due process" and a loss of

"substantial magnitude," while Justice Douglas has held denial of a fair trial "invalid under the Equal Protection Clause." *Boddie v. Connecticut*, 401 U.S. 371, 377, 380-81, 384 (1970).

The opportunity to be heard, to have one's day in court, is concededly a "fundamental requisite of due process of law" (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)), and among the "basic fair trial rights" are unquestionably a litigant's right to "an impartial adjudicator, be it judge or jury." (*Rivera v. Minnich*, 482 U.S. 574, 581 (1987)). Errors in this process, such as, in "illegally admitting highly prejudicial evidence or comments" rise to the level of a "constitutional error" for having affected "substantial rights." *Chapman v. California*, 386 U.S. 18, 23-24 (1967). Such rights are declared by the United States Constitution to be unalienable.

To put this claim in proper perspective, it is necessary to view the expansive general purpose of federal and state laws banning employment discrimination, which is to make employment free from proscribed types of discrimination – or a civil right. Consequently, neither the New Jersey courts nor any state court should be allowed to ignore the plain meaning of the applicable laws and the relevant decisions rendered by the United States Supreme Court.

Just as neither Congress nor the Supreme Court can abridge constitutional rights by their enactments, so also state courts cannot curtail or abrogate them whether by affirmative actions, through erroneous, inappropriate deci-

sions, or negatively, through their silence or refusal to grant certification to review lower court rulings challenged for having prima facie violated constitutional or civil rights. The judicial obligation of the courts to protect the fundamental rights of individuals is as old as the country itself.

2. The Civil Rights Issue

One of the central considerations in this Petition concerns whether New Jersey has correctly and properly applied the judicial standards and shifting burden of proof rules prescribed by the United States Supreme Court in *McDonnell Douglas*, which has been upheld by decades of federal and New Jersey precedents. If not, then, as Petitioner claims, he was denied a fair trial and due process in violation of constitutional rights and applicable judicial precedents established by the United States Supreme Court.

If, as Petitioner contends, the New Jersey court decisions are in direct conflict with the proper interpretation and application of the *McDonnell Douglas* prescriptions, they are also thereby seriously undermining the legislative goals of federal and state anti-discrimination statutes. When interpreting the rules of *McDonnell Douglas*, great weight should be placed on the long line of precedents that explain and clarify its intent. Accordingly, there can be no justification for New Jersey or any state court to deviate from those principles in this or any discrimination case.

With this in mind, the courts are expected to be vigilant in enforcing civil rights against employment discrimi-

nation, rights to which employees are entitled under applicable federal and state laws as interpreted by the Supreme Court, more so when the employer's conduct is shown prima face to be in violation.

To come full circle, the decision rendered in *Trans-World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-22 (1985) by the Supreme Court should be noted for having established a vital connection between the constitutional and *McDonnell Douglas* aspects in ruling that: "The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure plaintiff (has) his day in court . . . ."

(a) Applicability of *McDonnell Douglas* Rules

Although this case involves an age discrimination suit brought in New Jersey courts under New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. 10-5 et seq., the fact that the federal legal principles expressed in *McDonnell Douglas* are fully applicable to and should be applied correctly and fairly in this case, is beyond dispute.

New Jersey LAD is first of all closely modeled on the federal statute against age discrimination set forth in the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. s. 621 et seq., and the New Jersey courts moreover have unreservedly accepted and applied the *McDonnell Douglas* rulings to govern their disposition of age discrimination cases brought under LAD. In *Mogull v. CB Commercial Real Estate*, 162 N.J. 449, 465, 744 A. 2d 1186 (2000) the New Jersey Supreme Court made this

crystal clear, as have other New Jersey decisions, by affirming adherence to *McDonnell Douglas* and *Burdine* precedents in no uncertain terms, stating:

> "This Court has applied the same test to claims brought under LAD . . . Once the prima facie case has been established, the *McDonnell Douglas* analysis is followed in all other respects." *Id.* at 462

Citing *Burdine* and *Hicks*, the New Jersey Supreme Court ruled specifically that an employer is required to meet its burden to rebut an employee's prima facie case if its "'evidence raises a genuine issue of fact.'" In that event: "the deciding factor" in analyzing an employer's proffered reasons was whether they were 'legally sufficient. . . by producing evidence. . .of non-discriminatory reasons.'. . . ." The function of determining whether the employer has met the second stage of the *McDonnell Douglas* three-phase test, is, moreover and significantly, one of law for the courts to decide." *Id.* at 468-69, 473. But, how a "genuine issue of fact" can be properly "framed" in any lawsuit in which inadmissible hearsay evidence is proffered by one of the main litigants, would appear to be a stretch.

In the course of its *Mogull* decision, the Court referred approvingly to an earlier decision in *Maiorino v. Schering-Plough, Inc.*, 302 N.J. Super. 323, 345-46, 695 A. 2d 353 (App. Div. 1997), certif. denied, 152 N.J. 189, 704 A.2d 19 (1997) that rendered one of the most extensive judicial endorsement ever given for applying federal evidentiary rules to New Jersey discrimination cases. Citing a host of

federal and New Jersey decisions, the *Maiorino* court made the *McDonnell Douglas/Burdine* burden of proof rules the "proper procedure" for New Jersey's discrimination cases. It explained in this connection that:

> "In analyzing a LAD claim, New Jersey courts have used the framework set forth by federal anti-discrimination statutes: the Age Discrimination in Employment Act. . . and Title VII . . . . 'Age discrimination claims under the LAD and the ADEA are governed by the standards and burden of proof structures applicable under Title VII of the Civil Rights Act of 1964 . . .'"

(b) The *McDonnell Douglas* Rationale

The basic *McDonnell Douglas* principle which was amplified and clarified by *Burdine*, holds that once a prima facie age discrimination case is made, the burden shifts to the employer to "clearly set forth, through the introduction of admissible evidence" legitimate, non-discriminatory reasons for its discrimination and to frame the factual issue with such "sufficient clarity" that the employee will have a "full and fair opportunity" to rebut. The burden then shifts back to the employee to rebut with evidence of his own.[8]

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[8] *Burdine*, *supra* at 255-57, n 9. (Emphasis added.) In a span of four pages (254-57), the terms "evidence," "sufficient," and "admissible" are cited more than 20 times. It is inconceivable that the Court intended to use such terms as fungible with "inadmissible" type of evidence.

In *Burdine* the Supreme Court also rejected outright the notion that an employer could carry its burden by articulating reasons that are "not admitted into evidence," such as an answer to a complaint or a counsel's argument, and, presumably, in Petitioner's view, inadmissible hearsay evidence.[9] Further clarification of the *McDonnell Douglas* burden of proof rules was provided in *Furnco Constr. Corp. v. Waters*, 438 U.S.567, 577, 580 (1978) that likewise requires the employer to "prove" its legitimate reasons. The decision is notable however for indicating that terms like "prove," "evidence" and "articulate" can be used interchangeably on this issue, although in the end, they are all designed to describe the "only way" by which employers should be allowed to discharge this burden.

The United States Supreme Court also made clear in *Batson v. Kentucky*, 476 U.S. 97-98, 106 (1986), citing *Burdine*, that if the employer fails to meet this burden or if "easily generated" explanations should be accepted to discharge its obligation to justify discriminatory acts, the employee is deemed to have been denied a fair trial.

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[9] Id., at 256, n 9. It added that the sufficiency of the employer's evidence should be "evaluated by the extent to which it fulfills these functions," *i.e.*, the functions of framing the factual issues with sufficient clarity. See also New Jersey concurring decisions in *Bergen Commer. Bank v. Sisler*, 157 N.J. 188, 207-09 (1999) and *Murray v. Newark Hous. Auth.*, 311 N.J. Super. 163, 173,176-77 (1998), where evidence produced by the employer had "evidential deficiency" and the court ruled: "In essence, defendant's proofs have no more significance than if defendant had remained silent."

As a result, when the employer fails to meet its burden, the employee's prima facie presumption of discrimination remains unrebutted and judgment in his favor should be mandated as a matter of law. *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 147 (2000); *Murray v. Newark Hous. Auth.*, *Id.*

In light of the foregoing, it is highly unlikely and unfair to expect factual issues raised in judicial proceedings to be properly framed in accordance with established rules of evidence, and be framed with sufficient clarity, through the use of inadmissible evidence. If it were so held, inevitably, the employee will be severely hamstrung and denied the "opportunity" to respond and carry his third stage of the *McDonnell Douglas's* shifting burden rules.

(c) Employer's Failure to Meet Its Burden

Once an employer fails either to meet its burden of producing a legitimate reason and/or establishing compelling reasons of business necessity to explain its unlawful conduct, then discrimination is the "most likely explanation" since the employer was in the "best position" to put forth the actual reasons for the adverse actions. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000).

As a consequence, in line with Supreme Court decisions, (*E.g.*, *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996), *St. Mary's Home Center v. Hicks*, 509 U.S. 502, 509-510 n.3 (1993) and *Burdine, Id.*, 256), where the employer remains silent or fails to

discharge its *McDonnell Douglas* burden of production, "the court must award judgment to the plaintiff as a matter of law . . . it must find the existence of the presumed fact of unlawful discrimination, and must, therefore render a verdict for the plaintiff."(*Burdine*, *Id.*, 254. Emphasis added). This holds true in either a jury or bench trial.

Applying these precedents, the decisions by New Jersey courts authorizing employers as a matter of law to discharge their *McDonnell Douglas* burden with legally inadmissible evidence, represent a legal miscarriage of constitutional proportions, thereby requiring resolution as prayed for in this Petition.

3. The Hearsay Rule

Judicial admonitions about hearsay evidence extend beyond memory. In *Queen v. Hepburn*, 11 U.S. 290, 295-96 (1813), Chief Justice Marshall in calling the hearsay rule the decision "which determines them all," explained:

> "It is this: That hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who spoke from their own knowledge . . . hearsay evidence is in its own nature inadmissible. . . . Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible . . ."

Much later, in *California v. Green*, 399 U.S. 149, 186-87 (1970), Justice Harlan elevated the hearsay rule to a "matter of due process," and ruled when the hearsay declarant is available, (as in this case): "There is no reason in fairness" why the witness should not be produced, because, simply put: "this principle is an essential element of fairness." Exceptions or greater flexibility and accommodations with the rule arise when the witness is not available.

When the unlimited admission of hearsay permitted by the New Jersey courts in this case is viewed in this context, a further factor militating against admission requires consideration, *i.e.*, whether, whatever probative value could be ascribed, if any, to the overwhelming use of Respondent's hearsay which inundated and dominated the trial for days, it was outweighed by the prejudicial impact on the jury, confusing, inflaming and distracting it from the main age issue in the case. The New Jersey Supreme Court and Appellate Division however apparently failed to consider such an important aspect as deserving of any attention.

4. Lack of Compelling Reasons of Business Necessity

The United States Supreme Court and federal decisions applying *McDonnell Douglas* have also made it abundantly clear that not only is the evidence which an employer is to produce under its burden of articulating a legitimate reason, to be "admissible" and "legally sufficient," but it must also be "based on legitimate considerations" or reasons of business necessity "sufficiently compelling to override any discriminatory impact." (*Burdine, Id., 255, n.9, 258; Lynch*

v. U.S., General Services Administration, 1989 U.S. Dist. LEXIS 5893 (Para.11), requiring "legitimate justification."

The mere submission of a reason alone is "not enough." There must also be evidence that no alternative policies or practices were available which would better accomplish the business purpose or accomplish it equally well but with lesser discriminatory impact." *Palmer v. General Mills, Inc.*, 513 F. 2d 1040, 1044 (6 CA 1975). Even were the employer to show it was impractical to pursue other less discriminatory alternatives, the courts have held such evidence "insufficient." The test is business necessity, "not a business convenience." *Usery v. Tamiani Trail Tours, Inc.*, 531 F. 2d 224 (5 CA 1976).

Assuming arguendo Petitioner was guilty as charged, Respondent never showed that the successive adverse actions inflicted on him in his last year were truly necessary and compelled by overwhelming reasons of business operations. Equally important, it failed to show also there were no other less discriminatory or non-discriminatory alternatives that it could have applied for dealing with Petitioner's misconduct.

In other words, was there really a compelling business necessity and no other alternative but to strip Petitioner of his regular assignments, to transfer them to younger, junior attorneys, relegate him to administrative, clerical tasks, downsize his office, deny him promotions, reduce his salary and bonus and deprive him of secretarial assistance? Respondent provided no answer to such queries, but for

Petitioner the answer was obvious: It wanted to discriminate against him because of his age, and it did.

5. Preclusion of Petitioner's Witnesses and Rebuttal

The trial court not only rejected Petitioner's witnesses whom he had to call to prove his case, as too inflammatory, but also accepted Respondent's argument that such witness should be precluded for not working in the very same legal department as Petitioner, notwithstanding that both were attorneys, performing services for one Respondent, had interactions in performing their duties, and were both employed and subject to the same corporate management.

In *West v. Philadelphia Electric Co.*, 45 F. 3d 744, 753, 756-57 (3d Cir. 1995), the court rejected this approach in upholding the "totality of circumstances," *i.e.*, the "work atmosphere as a whole" in deciding to accept evidence of discrimination suffered by employees other than the plaintiff who worked in the same company. It reached this conclusion notwithstanding that they worked in units or divisions different than the plaintiff's. The basis for it from the court's perspective was that "a discrimination analysis must concentrate not on individual incidents, but on the overall scenario."

Likewise, in *Kunda v. Muhlenberg College*, 621 F. 2d 532, 539 (3d Cir. 1980), the court approved the comparison of teachers working in totally different departments throughout the same college, as proof to show discriminatory treatment suffered by the suing teacher. The

New Jersey Supreme Court is also on board with this approach, holding there is no requirement that co-workers of a discriminated employee must have the "exact same requirements" for their testimony to be admitted, if they are subject to the same policies of the employer. They can be of different sexes, work in different departments, at different locations, even with different assignments and responsibilities. *Dixon v. Rutgers*, 110 N.J. 432, 444-45 (1988); *Rendine v. Pantzer*, 141 N.J. 292, 309-10 (1995).

Regarding its refusal to allow Petitioner's rebuttal case, the trial court explained it was a "needless consumption of time" which could also "inflame" the jury. In light of the seminal issue of the case being whether he left voluntarily or was forced to leave, it was crucial to Petitioner's case to challenge Respondent's proffered evidence on such a salient issue. It is incomprehensible why the trial court chose arbitrarily to permit the jury to be informed only of Respondent's side of the crucial issue.[10]

6. Public Importance of the Issues

The public importance of the issues in this Petition is obvious. It is profoundly important and of national concern for the Supreme Court to resolve the split with the New Jersey courts in the area of employment discrimination and

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[10] N.J. App. Div. Brief, 62; Reply Brief, 56. For authorities mandating a reasonable exercise of judicial discretion in granting requests for rebuttal cases, see *e.g.*, *Garafola v. Rosecliff* Realty Co., 24 N.J. Super 28, 42-43 (App. Div. 1952) and *Casino Reinvest. Dev. Auth. v. Lustaren*, 32 N.J. Super, 472, 497 (App. Div. 2000).

to ensure the uniform, consistent and effective application of *McDonnell Douglas* evidentiary directives in such cases. It is imperative moreover that the conflict engendered by the erroneous conclusions reached by New Jersey courts in their decisions in this case, in opposition to the Supreme Court's prescriptions, be settled. Denial of a fair trial alone presents issues of constitutional concern, but when coupled with a state court's substantive departure from the evidentiary rules mandated by the Supreme Court, the concern devolves into greater concern with ensuring the unbiased, balanced implementation of a vital national policy that is necessary to free the workplace from unlawful discrimination.

If the evidence for an employer to carry its *McDonnell Douglas* burden can be of the inadmissible sort, such as, hearsay, the balance in the policy's implementation will be sorely undermined and tilted against the employee. In such a scenario he will have to face much more formidable roadblocks to the full and fair opportunity he needs to counter the employer's reasons and seek redress for conduct that is shown prima facie to have violated federal and state anti-discrimination laws. His rights will in short be rendered ineffectual if not totally illusory.

The potential for such concerns to materialize has already been made manifest through the erroneous rulings of the New Jersey courts as explained in this Petition, and as a result of which Petitioner was prevented from proving his age claim, from calling key witnesses with relevant

knowledge and from presenting a rebuttal case that was critical for proving his claim.

To permit the New Jersey decisions to stand as legal precedent, permits also sharply different standards of treatment to apply to similarly situated employees suing in federal vis-à-vis those suing in New Jersey or other state courts. This thereby facilitates unequal, not equal, protection of the laws, and creates intolerable conflicts and confusion regarding the proper evidentiary rules for discrimination cases. The aftermath envisioned by such inequality inevitably will result not only in severe unfairness for employees, but also an erosion of the national public policy of eliminating all forms of discrimination from the workplace in our society.

CONCLUSION

Wherefore, for these reasons, Petitioner requests this Honorable Court to issue a writ of certiorari to the New Jersey Supreme Court directing it to issue the writ of certification prayed for in his petition for certification filed with it on May 17, 2004.

Dated: August 30, 2004 Respectfully submitted,

Theodore R. Giuttari, Esq.
Attorney for Petitioner, Pro Se
2457 Kennedy Boulevard
Jersey City, NJ 07304-1913

TABLE OF APPENDICES

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APPENDIX A

Supreme Court of New Jersey
C-1181 September Term 2003
56,322

THEODORE R. GIUTTARI,
Plaintiff-Petitioner
v.
AMERICAN HOME PRODUCTS CORPORATION
Defendant-Respondent

ON PETITION FOR CERIFICATION
Filed June 17, 2004

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-639-01 having been submitted to this Court, and the court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the honorable Deborah T. Poritz, Chief Justice, at Trenton, this 15th day of June, 2004.

The Foregoing is a
true copy of the
original on file
in my office

S/STEPHEN TOWNSEND
Clerk of the
Supreme Court
Of New Jersey

S/STEPHEN TOWNSEND
Clerk of The Supreme Court

APPENDIX B

Superior Court of New Jersey
Appellate Division
Docket No. A-639-01T1

THEODORE R. GIUTTARI,
Plaintiff-Appellant / Cross-Respondent,

v.

AMERICAN HOME PRODUCTS CORP.
Defendant-Respondent / Cross-Appellant.

Submitted March 24, 2004 – Decided April 7, 2004
Before Judges Conley, Carchman and Weissbard.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, L-1984-98.

Theodore R. Giuttari, appellant/cross-respondent pro se.

Carpenter, Bennett & Morrissey, attorneys for respondent/ Cross-appellant (Patrick G. Brady, of counsel; Mr. Brady and Linda B. Celauro, on the brief).

PER CURIAM

Plaintiff appeals a no cause jury verdict in his age discrimination complaint against his employer of twenty-three years, American Home Products Corporation (AHP). Defendant cross-appeals a denial of its statutory limitations motion for summary judgment. We affirm the no cause verdict and do not, therefore, address the cross-appeal issues.

At the age of forty-two, plaintiff was hired by AHP in 1973 to work in the international law section of AHP's law department, then headquartered in New York City. At the time, and during his twenty-three year tenure, AHP was a pharmaceutical company with international operations in 145 countries. Its business divisions encompassed pharmaceuticals, over-the-counter products, medical devices, agricultural chemicals, food products, veterinary products and high-end exercise products. Plaintiff came to AHP with good credentials – in addition to his J.D., he had Ph.D. from Columbia in international law and relations. He spoke four foreign languages and had served for six years as an assistant professor at Rutgers teaching political science and then worked for a Wall Street law firm. Through the end of his career at AHP, he was thought of as an asset, receiving regular yearly salary increases and bonuses. Even in 1996, his last year at AHP, plaintiff received a salary increase and bonus, although not as much as in prior years.

In the early 1990's, when plaintiff reached his sixty's, he thought he began to see a pattern of diminution in the importance of his work assignments. This trend coincided with the 1989 hiring of Eileen Lach, then in her thirty's, initially as Special Counsel, Intentional, ultimately, in 1993, as head of the international law section. It also coincided with the hiring of several new, younger staff attorneys. Although plaintiff's assignments in the 1990's were not insubstantial, some were more administrative than legal. He saw the younger staff attorneys receive what he considered to be more important, substantive, work.

Also, during this time period plaintiff did not receive promotional opportunities that arose in 1992 and 1995. And, in 1995 his office was relocated to a somewhat remote area and secretarial support was significantly reduced. For the first time, in early 1996 he received and evaluation tht was not 100% positive and his salary increase and bonus was not as substantial as in prior years. He resigned in June 1996.

Plaintiff attributed all of this to age discrimination. In his subsequent complaint, he claimed hostile work environment, discriminatory denial of promotional opportunities and, as to his June 1996 resignation, constructive discharge. AHP responded in depth to each and every one of plaintiff's factual assertions. Each of plaintiff's work assignments over the years was explained with legitimate reasons therefore. So too the 1992 and

1995 promotions. The rationale for plaintiff's 1996 evaluation, the somewhat reduced salary and bonus increases, and the 1995 office relocation and secretarial changes were equally well explained.

Prior to events of 1995/1996, plaintiff had made other job inquiries. But it was not until the secretarial issues and salary/bonus issues that he became serious and, ultimately, found other employment, albeit in Saudi Arabia and at a lower salary.

Here is what the record shows as to the 1995/1996 events and the precipitating circumstances. From 1993 to 1995, plaintiff had shared a secretary, then in her early twenties, with another AHP lawyer who was less senior than he. The relationship appears to have been initially congenial, but deteriorating in the end, with tension created by the secretary's inability to, in plaintiff's view, promptly meet both attorneys' needs. Nonetheless, over the two years of this relationship, plaintiff and his family had vacationed in he secretary's native country, Puerto Rico, where they visited her parents who lived there. He also did the legal work on a real estate closing and refinancing for her and her boyfriend. When she was in an auto accident, he gave her advice and referred her to an attorney. Plaintiff generally described his relationship with her as "bantering and teasing...joking and jesting."

In early 1995, however, plaintiff contemplated a change in the secretarial situation. He broached the subject to the secretary, voicing his concern that she was not able to handle both attorneys' needs. He proposed that she stay with the younger lawyer as he thought that was what she wanted. In fact, the record is fairly clear that he pestered the secretary with this proposal. At the end of April, plaintiff was to leave for an extended business trip to Saudi Arabia. He left a written request to his superior, Lach, for the change and requested his secretary to, if agreeable to her, forward it. Apparently this prompted the secretary to voice to Lach her concerns that plaintiff made her feel uncomfortable and articulated certain conduct on his part.

The secretary never testified during the trial and much of her characterization of plaintiff's conduct was heard by the jury through several witnesses to whom she had voiced her views or to whom whose views had been reconveyed. The jury, then, heard much hearsay of these matters. Ordinarily, this would be troubling to us. The problem between plaintiff and the secretary was made an issue by plaintiff's assertion that there was no truth to any of it and that his 1996 evaluation, reduced salary increase and bonus, his office relocation, and secretarial reduction was the the product of trumped up charges by the secretary and an inadequate investigation by AHP. Hearsay should not be used by a jury to ascertain the truth of all of this.

But here are plaintiff's own admissions. Plaintiff admitted he sent the secretary a November 4, 1993, birthday fax in which he wrote in part: "Have a very, most exceedingly happy day, & even a happier night! Now that you're over "21" (at last!) You no longer need to say "STOP IT!!" or "LEAVE ME ALONE!!" (Right?) (save me some Birthday Cake?) [-or- You won't get your Birthday Present.] Happily yours, The BOSS, The Chief, El Supremo, Il Capo, Der Furher, Il Duce." He admitted, when dictating to the secretary a draft letter of recommendation for her for a paralegal school, he suggested including that she had "very nice legs." He admitted he tried to convince her to work, rather than take a day off, to study for school exams by telling her no one would bother her "no matter how horny anyone would get."

He admitted she expressed offense at the "horny" remark and, as a result, she returned his 1993 Christmas gift based upon her being offended by his behavior. Plaintiff left the secretary an article on sexual harassment shortly thereafter.

Plaintiff admitted that in March and April 1995, he sent the secretary a number of cover notes, attaching draft proposals to his supervisor Lach requesting a new secretarial assignment, in which he stated such things as: he would prefer to keep her, but she was gloomy, cool, and abrupt with him, and the opposite with the other attorney, and, "we would both be better with a change in relationship

if you don't like me" but he "would need to look for someone resembling Marilyn Monroe." He wrote to her:

[Y] our job is quite secure and I would never do anything to jeopardize....

[W]hy so gloomy to me, let me, let me say you just don't react to me as you do with everyone else, that includes your co-workers, DTK, mailboys, etc....

Suppose you were a boss and had a secretary, and she popped in the day before Easter, and knew you were around, but would not bother saying 'Have a nice holiday', or thanks for the bunny..... I must confess tht I'm still miffed at your returning XMAS gifts to me 20 Christmases or so ago – and I thought you would realize how terrible that was for me at least, and say you're sorry-but I'm not given to fantasies. I believe our relation really went down hill after that.....

Plaintiff admitted his April 17, 1995, note to her which states, that because he signed her time sheets: "[S] ee what a nice guy I am but can't figure out your grudge or something." Plaintiff, further, admitted that, when he was in Saudi Arabia, he sent her a May 1, 1995, postcard in which he wrote: "After our last 'discussions' don't know if I can honestly say (as in all post cards) – WISH YOU WERE HERE! It's been 4 days, 16 hours, & 25 minutes since I've seen a full bodied woman – So maybe I should

wish for ANYONE to be here. If you look closely enough at the crowd scene, you may find me or someone resembling my cheery disposition which can only be matched by your equally cheery disposition! So there!"

He admitted that, after he called her from Saudi Arabia at her home at 10 p.m. May 9, 1995, he sent her a May 10, 1995, cover fax (to which he attached a mock trip report), in which he wrote "To show my gratitude, I'll also treat you to a one way [crossed out] RT trip to PR [Puerto Rico] to see your mom and how your bedroom looks (didn't I already describe it?)." In the attached mock trip report plaintiff sent the secretary, he: described certain fantasies about a female employee; mentioned inviting a young female attorney to his hotel room; referred to another young woman as being like "my Michelle [Ayala] ; said "a man thinks of sex every 15 minutes or so"; and described certain fantasies about a stewardess.

Plaintiff's own witnesses, moreover, testified that plaintiff did tell jokes with double meanings sometimes and sometimes jokingly behaved in a way that could be called sexually offensive.

On appeal, plaintiff contends:

Point I: The Trial Court's admission of defendant's hearsay testimony in violation of New Jersey rules of evidence

constitutes prejudicial error and thereby warrant's reversal and requires a new trial.

1. Application of hearsay rule.
2. Lack of exceptions to justify admission limiting instructions.
3. The trial court's failure to give limiting instructions.
4. The probative value of the hearsay statements was outweighed by their prejudicial effect upon plaintiff's case.

Point II: It was reversible error for the trial court to accept and permit defendant to articulate the unfounded charge of sexual harassment as their non-discriminatory reason for the discriminatory acts of by plaintiff.

Point III: The trial court' exclusion of plaintiff's appropriate pattern and practice of age discrimination is prejudicial error and requires reversal and a new trial.

Factual Analysis

Legal Criteria for establishing pattern and practice.

Point IV: The trial court's exclusion of plaintiff's rebuttal case severely prejudiced his case and constitutes reversible error requiring a new trial.

Point V: The jury's deliberations of less than an hour was so unreasonable as to deprive plaintiff of is due process right to a new trial.

We have read the entire transcript of this fully litigated dispute. Points III and IV involve discretionary calls on the part of the trial judge which we see no basis for second guessing. Points I and II, though causing some initial concern on our part, in the end are rejected as plaintiff's own admitted conduct is direct evidence of defendant's non-aged based rationales for the precipitating 1995-96 events. We do no more than address the points briefly. As to point V, we comment only that the length or brevity of a jury's deliberations is not necessarily a reflection of how thoroughly or carefully a jury may have deliberated. Despite this being a ten-day trial, our assessment of defendant's evidence coupled with plaintiff's won evidence, and in light of the fact that, in the end, it was plaintiff's burden to prove pretext, leads us to confidently consider the short deliberations nothing more than the product of an astute jury.

As to points I and II, we have this to say. Before trial, plaintiff moved to bar all evidence pertaining to the secretary's complaints to plaintiff's supervisors about her discomfort with his behavior. When the trial judge pointed out that plaintiff's position to that point had been that defendant "concocted" the matter "to get rid of him,"

plaintiff's attorney responded that she would "give up the proof," so that the jury would not "hear [his secretary's name]." That is, counsel asserted that plaintiff would "give up" evidence of the office relocation and subsequent secretarial difficulties. But he still sought to admit evidence of his 1996 low salary and bonus increments and that he "never again had a permanent secretary." Defendant's perception of the secretarial behavior, however, was central to those matters. Indeed, it was central to plaintiff's resignation. Thus, the trial judge observed: "It's like the big gorilla standing in the middle of that department and we're going to ignore it." Denying plaintiff's motion for a new trial, the judge confirmed this decision, explaining that the jury should not be asked, "to consider a completely unreal situation," which plaintiff admitted was "part of his reality in that work environment."

The decision to admit evidence because it is relevant or to exclude it because its prejudicial nature outweighs its probative value is within the discretion of the trial judge. E.g. Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999). We interfere with these types of trial decisions only if "the trial court palpably abused its discretion, that is...its finding was so wide off the mark that a manifest denial of justice resulted." Ibid.

The secretarial events here were essential to explain some of defendant's adverse actions toward plaintiff: moving his office, changing his secretarial support, and

lowering his salary increment and bonus. Simply stated, plaintiff established his prima facie case. But defendant was entitled to explain its reasons for the alleged discriminatory actions. Plaintiff represented that he was willing to "give up the proof" relating to the secretary's claims but his insistence that he would remain entitled to introduce evidence of his loss of his permanent secretary and his reduced increment and bonuses belie his position. Moreover, plaintiff's arguments on appeal that the secretary withdrew her concerns, that AHP's investigation was inadequate and that plaintiff and the secretary had a consensual relationship were all substantially undercut by plaintiff's admitted behavior. In point II, plaintiff complains that the evidence of the secretary's complaints was the product of hearsay, double and triple the times, and that no limiting instruction (none was requested) was given by the trial judge. We agree as to all of that. The critical issue is whether that was reversibly harmful to plaintiff. Given plaintiff's own admissions, the hearsay evidence was incidental. We note, too, that the summations in this trial were lengthy, covering all aspects of the evidence, only a small part of which concerned the secretarial matter. Indeed, AHP's counsel's reference to the hearsay evidence concerning that was not particularly extensive. Rather, he focused upon plaintiff's own evidence. We are firmly convinced that any error in either admission of the hearsay evidence or failure to give a limiting instruction could have had no impact on this verdict.

Affirmed

I hereby certify
that the forgoing
is a true copy of
the original on
file in my office.

S/James Flynn
Clerk of The Appellate
Division

APPENDIX C

28 U.S.C. s 1257. State Courts; certiorari

(a) Final judgments of decrees rendered by the highest court of a State in which a decree could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of any commission or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, ch646, s 1, 62 Stat. 929; July 29, 1970, P.L.91-358, Title I, Part D, Subpart 2, s 172 (a) (1), 84 Stat. 590: June 27, 1988, P.L. 100-352, s 3, 102 Stat. 662.)

APPENDIX D

28 U.S.C. 2104. Review of State court decisions

A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in court of the United States.

(June 25, 1948, ch 646, s 1, 62 Stat. 962; June 27, 1988, P.L. 100-352, s 5(d) (1), 102 Stat. 663.)

APPENDIX E

28 U.S.C. 1651. Writs

(a) The Supreme Court and courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule may be issued by a justice or judge of the court which has jurisdiction.

(June 25, 1948, ch 646, s.1, 62 Stat. 944; May 24, 1949, ch 139, s 96, 63 Stt. 102.)

APPENDIX F

Wolff & Samson
A Professional Corporation
5 Becker Farm Road
Roseland, New Jersey 07068
973-740-0500
Attorneys for Plaintiff

THEODORE R. GIUTTARI, Plaintiff, v. AMERICAN HOME PRODUCTS CORPORATION, Defendant.	Superior Court of New Jersey Law Division: Morris County Docket No. MRS-L-1984-98 Civil Action Reply Certification in Support of Plaintiff's Motion for a New Trial

LORI E. GRIFA, of full age, hereby certifies as follows:

1. I am an attorney-at-law of the State of New Jersey and associated with the law firm of Wolff & Samson, attorneys for the plaintiff in the above matter. I submit this reply certification in further support of the plaintiff's motion for a new trial, which is presently scheduled for oral argument before the Honorable Catherine M. Langlois on August 17, 2001.

A. The Admission of Extremely Prejudicial and Improper Hearsay Testimony into Evidence Denied the Plaintiff a Fair Trial.

2. Double and triple hearsay testimony was offered by the defendant at trial to establish the "truth". The defendant never stated at trial that the testimony was offered for any other purpose other than the truth. The court never instructed the jury that this hearsay testimony was not to be considered for anything other than the truth. Compelling examples of this impermissible hearsay testimony are set forth in the reply letter brief filed concurrently herewith. The uncontradicted evidence from Michelle Ayala's own hand was that she spoke to representatives of AHP's Human Resources department in April and May 1995 so that she could switch attorney assignments. She never accused or complained of sexual harassment. A copy of Ms. Ayala's February 5, 1998 letter to the plaintiff is attached hereto as Exhibit A. In view of Ms. Ayala's letter to the plaintiff, it was plainly error for the Court to permit multiple defense witnesses to testify over many trial days as to what Ms. Ayala purportedly said to others, unless that testimony was being offered for the truth. The defendant's use of this evidence was designed to

prejudice the plaintiff in the eyes of the jury. The Court's refusal to preclude this hearsay testimony, and the Court's failure to give the jury any limiting instruction as to the permissible use of this testimony, denied the plaintiff a fair trial.

B. The plaintiff was Denied an Opportunity to Present Evidence of the Defendant's Pattern and Practice of Age Discrimination.

3. At this deposition, the plaintiff named nearly a dozen people who were terminated in their fifties and sixties from their employment with the defendant for no apparent reason other than their age. Copies of the relevant portions of the plaintiff's deposition testimony in this regard are attached hereto collectively as Exhibit B. Most of these individuals believed their termination was motivated by age discrimination, and they expressed these thoughts to the plaintiff. Indeed, the particular treatment that these older employees complained about immediately preceding their termination included the removal of their meaningful job duties and the assignment of menial functions. Such discriminatory conduct visited upon these employees was the same conduct that the defendant inflicted upon the plaintiff as he approached age 65. The statements and treatment of these individuals, namely Elie Caracand, Carole Farthi, Patrick Gibbons, Alfred Jablonski, Dieter Kraus, Judith Sands, Herbert Schneider, Elsie

Trivedi, Walter Wien and Marcel Zyto, weighed heavily on the plaintiff's mind as he approached age 65 and caused plaintiff to believe that his employment with the defendant was likely to be terminated because of his age. This information was directly relevant to the plaintiff's state of mind, particularly with respect to the plaintiff's claim of constructive discharge, which was a key issue in the case. The plaintiff should have been permitted to offer his testimony in this regard to the jury at trial.

4. Similarly, the defendant's discriminatory treatment of Alfred Jablonski also paralleled the manner in which the defendant treated the plaintiff. For this reason, Mr. Jablonski was a proper witness at trial and should have been permitted to testify so that the plaintiff would have a fair opportunity to prove his claim of pattern and practice age discrimination.

5. The Court's rulings precluding the plaintiff's testimony about his knowledge of the defendant's treatment of other older employees, and the Court's exclusion of Alfred Jablonski as a trial witness, cumulatively denied the plaintiff a fair trial and the opportunity to present proofs of the defendant's pattern and practice of age discrimination.

C. The defendant called numerous witnesses on its case and put hundreds of documents into

evidence. All of this testimony and these documents constituted "new" facts for the jury's consideration. The plaintiff should have been permitted to address all of this evidence by way of a rebuttal case, but the Court precluded this evidence. In so doing, the court flatly denied the plaintiff the right to present any rebuttal case whatsoever. The court denied the plaintiff a fair trial.

7. On rebuttal, the plaintiff and his wife could have challenged and contradicted the testimony adduced by the defendant, particularly the evidence offered to show that the plaintiff's employment in Saudi Arabia was not a hardship, but was part of the plaintiff's "plain". The testimony of the plaintiff and his wife could have rebutted the defendant's defense in this regard and also could have directly supported the plaintiff's defense in this regard and also could have directly supported the plaintiff's claims a) that he was forced to seek work overseas, b)that he did not want to leave AHP to work overseas and c) that due to the constructive discharge, the plaintiff suffered family disruption, for which the New Jersey law Against Discrimination, N.J.S.A. 10:5-1 et seq., provides an express remedy and damages.

D. Conclusion

8. The cumulative effect of the foregoing rulings denied the plaintiff a fair trial. Accordingly, the plaintiff's motion for a new trial should be granted.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false. I am subject to punishment.

Dated: August 13, 2001 S/LORI E. GRIFA

APPENDIX G

Entered on ACMS
Received & filed,
2001-Aug. 22, PM 4:04
Michael J. Arnold
Morris County

Deputy Clerk ,
Superior Court
Filed, Aug. 20, 2001
Catherine Langlois, J.S.C.
Judge's Chambers
Morris County

CARPENTER, BENNETT & MORRISSEY
Three Gateway Center
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Newark, New Jersey 07102-4079
(973) 622-7711
Attorneys for Defendant
American Home Products Corporation

THEODORE R. GIUTTRI

Plaintiff,

VS.

AMERICAN HOME PRODUCTS CORPORATION,

Defendant,

Superior Court of New Jersey
Law Division: Morris County
Docket No.: MRS-L-1984-98

Civil Action

ORDER OF JUDGEMENT

This matter, having been brought before the Court, and a jury trial having been held on June 4, 5,6,7, 11, 12 14, 18, 19, 20, 25, 26, 27 and 28, and the plaintiff's evidence having been fully heard, and the jury having returned a verdict in favor of the defendant on all claims, and for good cause shown,

It is on this 17th day of August 2001

ORDERED THAT judgment be and hereby is granted favor of defendant American Home Products Corporation on all claims; and it is further

ORDERED that plaintiff's Complaint be and hereby is dismissed in its entirety, with prejudice; and it is further

ORDERED that defendant American Home Products Corporation be and hereby is awarded costs allowed as of course to the prevailing party pursuant to Rule 4:42-8 and shall file an affidavit pursuant to Rule 4:42-8(c) and (d) identifying taxable by law; and it is further

ORDERED that counsel for defendant shall serve a copy of this Order on plaintiff's counsel within five days of its entry.

S/ Catherine M. Langlois, J.S.C.

APPENDIX H

Michelle Ayala
Carr. #2 Km. 97.7
Bo. Cocos
Quebradillas, Puerto Rico

February 5, 1988

Mr. Theordore r. Giuttari
2457 Kennedy Boulevard
Jersey City, New Jersey 07304

Dear. Mr. Giuttari:

When I spoke to AHP in April-May 1995, it was not my intent to complain or to accuse you of sexual harassment, but rather to seek reassignment to a position where I would no longer be working for you.

Very truly yours,

S/MICHELLE AYALA